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NOTES.

DEMURRAGE FOR FREIGHT CAR DETENTION.—Within recent years the right of a railroad to make reasonable charges for unnecessary delay in loading and unloading freight cars, similar to the demurrage charges of admiralty law, announced for the first time in New York in a late decision, *Erie R. R. Co.* v. *Waite* (N. Y. 1909) 62 Misc. 373, has received fairly wide recognition in statute[1] and case law. The English admiralty court has maintained that the right to charge demurrage is one existing *ex contractu*, by force of express stipulations in bills of lading,[2] though it has admitted that in addition to this absolute contract obligation on the consignee to pay for the detention of a vessel past the stipulated time, i. e. technical demurrage, there is an additional obligation implied to use "reasonable diligence" in loading or unloading.[3] The American admiralty courts, however, have asserted that there is a general right of demurrage, independent of contract,

[1]Statute laws of N. J. 1907 Ch. 56; Tex. Rev. Stat. sec. 4497-4500 (see 201 U. S. 321); Public Acts Mich. 1907 No. 312.

[2]Brouncker *v.* Scott (1811) 4 Taunt. 1; Chappell *v.* Comfort (1861) 10 C. B. (N. S.) 801.

[3]Ford *v.* Cotesworth (1868) L. R. 4 Q. B. 127.

to impose charges for unnecessary detention.[4] The effect of this conflict of authority on the necessity of contract is observable in the American decisions which treat of the newly developed right of a railroad to charge for car detention, variously termed "demurrage" or "a charge in the nature of demurrage."

First, there are the older decisions, now in the minority, which refuse to recognize the right unless expressly provided for in the contract of shipment.[5] Other decisions enforce the charge against the consignee when the consignor and the railroad have contracted for demurrage in the bill of lading, on the ground that by accepting the cargo and the bill the consignee in fact impliedly contracted to pay the charge.[6] Other jurisdictions hold that when the railroad publishes demurrage rules, consignor and consignee, even in the absence of stipulations in the bill, impliedly contract to pay the charges.[7] Others fix a pure quasi-contractual obligation, that is an obligation imposed solely by law, on the consignee to pay for the use of the car as a storehouse, to which his payment for freight does not entitle him,[8] a holding in conformity with the American admiralty rule that demurrage need not rest on contract. The Interstate Commerce Commission goes a step farther and permits the railroad company to collect a charge in the nature of a penalty, increasing as the time of detention lengthens.[9] However, irrespective of the theories of the obligation, as affecting the form of action, beneath all the decisions which allow the charge are certain common, urgent reasons which amply justify the result reached.

First, the demurrage charge is merely an extension of the well established right of the railroad to charge for storage after it has fulfilled its duties as a bailee for transportation and is holding the freight for the consignee, as a warehouseman. The cases which establish this right have to do with the situation where the railroad has removed freight from its cars and stored it in its depots or warehouses, but as has been properly urged, the same right should exist when the freight is left in the cars, as this method of storage in the majority of instances is as effectual as any other and results in a saving of time and expense to the consignee.[10] Secondly, the interests of all shippers demand that the railroad be permitted to enforce demurrage rules designed to help it perform its public duty of furnishing rapid and adequate service by compelling dilatory customers to load or unload promptly and free cars within a reasonable time.[11] This reason justifies the penalty charges allowed by the Interstate Commerce Commission. On these considerations the majority of recent decisions have further extended the right of the railroad by giving it a warehouse-

[4]The Apollon (1824) 9 Wheat. 362, 377; Hawgood *v.* 1310 Tons of Coal (1884) 21 Fed. 681.

[5]Chicago & N. W. R. R. Co. *v.* Jenkins (1882) 103 Ill. 588; B. & M. R. R. Co. *v.* Chicago Lumber Co. (1884) 15 Neb. 390.

[6]Sutton *v.* Housatonic R. R. Co. (1891) 45 Fed. 507.

[7]Miller *v.* Mansfield (1873) 112 Mass. 260; Miller *v.* Ga. Ry. Co. (1891) 88 Ga. 563; Pa. R. R. Co. *v.* Midvale Steel Co. (1900) 201 Pa. St. 624.

[8]Nicolette Lumber Co. *v.* Peoples' Coal Co. (1906) 213 Pa. St. 379; Chicago etc. Ry. Co. *v.* Pioneer Fuel Co. (1892) Beach Ry. Law §924; Darlington *v.* Mo. Pacific R. R. Co. (1903) 99 Mo. App. 1.

[9]N. Y. Hay Exchange Assoc. *v.* Pa. R. R. Co. (1908) 14 I. C. C. R. 178.

[10]Miller *v.* Ga. Ry. Co., *supra;* Schumacher *v.* Chicago & N. W. R. R. Co. (1904) 207 Ill. 199.

[11]Darlington *v.* Mo. Pacific R. R. Co., *supra;* Ky. Wagon Mfg. Co. *v.* Louisville & Nashville R. R. Co. (1891) 50 Amer. and Eng. R. R. Cases 90.

man's lien for demurrage charges though it was not stipulated for in the bill of lading.[12]

An interesting example of a statutory demurrage is found in two federal decisions[13] which establish a right in the railroad under the Interstate Commerce Act to charge demurrage on interstate shipments, subject to an ultimate adjudication as to its propriety by the Interstate Commerce Commission. The result is reached by holding that the act compels the shipper to pay promptly the published rate of the railroad, even though it includes a demurrage charge, a payment of less than the published rate exposing him to the penalties of the act for accepting rebates. A protest against the demurrage part of the rate can be addressed only to the Commission under a complaint as to the reasonableness of the whole rate.

THE EFFECT OF UNAVOIDABLE FAILURE OF SUPPLY UPON THE DUTIES OF PUBLIC SERVICE COMPANIES.—Public service companies are commonly said to be under obligation to serve all who apply "with adequate facilities, for reasonable compensation and without discrimination."[1] In ordinary cases, such a statement supplies adequate tests for discovering the duties of public service companies; but cases occasionally arise to which these rules are difficult of application. Such is the case of a natural gas company whose supply of gas is limited.

It has been argued that such a case should be governed by the rules applicable to the failure of a common carrier to furnish cars for an extraordinary demand.[2] The carrier is allowed to supply customers in the order of their application for service, in apparent disregard of the usual rule against discrimination. This condition, however, can only be temporary, because of the rule that the carrier must provide facilities adequate to ordinary demands.[3] To render the cases truly analogous, the gas company must be held to a similar duty of purchasing new gas fields. It is believed that the courts would not recognize such a duty.[4] Public service companies owe duties because of the nature of the function which they have undertaken.[5] The scope of those duties must, in some degree at least, be determined by the extent of their public profession, or undertaking to serve the public.[6] The nature of the business must also be considered.[7] Accordingly, a natural gas company would seem to undertake to supply gas only from its fields, which must be known, in the

[12]New Orleans & N. E. R. R. Co. *v.* George (1903) 82 Miss. 710; Southern Ry. Co. *v.* Lockwood Mfg. Co. (1904) 142 Ala. 322; Pittsburg C. C. & St. Louis R. R. Co. *v.* Moar Lumber Co. (1905) 27 Ohio C. C. 588. *Contra,* Crommelin *v.* N. Y. & Harlem R. R. Co. (N. Y. 1868) 1 Abb. App. 472; Nicolette Lumber Co. *v.* Peoples' Coal Co., *supra.*

[13]Central R. R. Co. of N. J. *v.* Hite (1909) 166 Fed. 976; Texas & Pacific Ry. Co. *v.* Abilene Cotton Oil Co. (1907) 204 U. S. 436.

[1]Beale & Wyman, Railroad Rate Regulation § 55.

[2]15 Harv. Law Rev. 571.

[3]Beale & Wyman, Railroad Rate Regulation §§ 262-265.

[4]No case, however, has been found decisive of this question. In State *ex rel v.* Consumers Gas Trust Co. (1901) 157 Ind. 345, it is expressly stated that this question is not involved.

[5]6 COLUMBIA LAW REVIEW 259.

[6]Elkins *v.* Boston & M. R. R. Co. (1851) 23 N. H. 275, 285; Citizens' Bank *v.* Nantucket Steamboat Co. (U. S. 1811) 2 Story 16; Johnson *v.* Midland Ry. Co. (1849) 4 Ex. 367, 371.

[7]Hutchinson, Carriers (3 ed.) § 90.